IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 970

BROTHERHOOD OF RAILROAD TRAINMEN, AN UNINCORPORATED ASSOCIATION,

Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PERE MARQUETTE RAILWAY COMPANY, AND WABASH RAILROAD COMPANY,

Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,

Intervening Plaintiff-Appellee,

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, AND THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendants-Appellees.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

JURISDICTION ON APPEAL.

For brevity, short forms of party names will be used. The appellant, Brotherhood of Railroad Trainmen, an unincorporated association, applicant for intervention, will

be called the Brotherhood. The plaintiffs-appellees, eight railroad companies which brought the suit in the district court, will be called the plaintiffs. The intervening plaintiff-appellee, Interstate Commerce Commission, will be called the Commission. The principal defendant-appellee, The Chicago River and Indiana Railroad Company, employer of the Brotherhood members, will be called the River Road.

This appeal was taken by the Brotherhood on January 6, 1947 from the order of the district court of November 7, 1946, denying its motion to intervene as a party defendant, the application to intervene having been made as a matter of right. Jurisdiction of the Supreme Court is invoked under those sections of the Judicial Code which provide for direct review by this court of a final judgment or decree of a district court in a suit to enforce an order of the Commission other than for the payment of money.

> Judicial Code, Section 238 (Expediting Act), (28 USCA Sec. 345), Section 210 (28 USCA Sec. 47a), and 28 USCA Sec. 44.

Since the applicability of the above sections to this case is questioned by plaintiffs only on the point of whether the order appealed from is a "final judgment or decree" within the meaning of these jurisdictional provisions, and that is the only question raised by their motion to dismiss (Tr. 299-300), we shall treat the subject below under Argument.

STATEMENT OF THE CASE.

We believe the facts in the case material to a consideration of the questions presented on plaintiffs' motion to dismiss or affirm are adequately stated in the Brotherhood's Jurisdictional Statement, paragraphs 1-3 (Tr. 236-240). A more extensive treatment, which we think includes many extraneous matters, is found in plaintiffs' opposing statement (Tr. 281-289).

Two inaccuracies in plaintiffs' statement may be worthy of mention, although we think they concern the merits of the case below rather than the Brotherhood's right to intervene. Plaintiffs state that the employment contract between the employees, represented by the Brotherhood, and their employer "could not have been in existence" on May 16, 1922, the date of the Commission order on which this suit is based (Tr. 288-289). The contract was signed on December 20, 1919, as is shown by the copy of it in the record (Tr. 174).

Plaintiffs also state (Tr. 284) that the moving of cars by the plaintiffs "*with their own power and crews*" over the line of the River Road was referred to in the Commission report of May 16, 1922 as "the only practical method of handling that traffic." The paragraph of the report from which that quotation was taken mentions only the "own power" of plaintiffs, and not their "own power and crews" (Tr. 23).

SUMMARY OF ARGUMENT.

I.

The motion to dismiss for lack of jurisdiction should be denied because the order appealed from is final and is therefore appealable to this court under the applicable statutes. Plaintiffs' motion to dismiss for lack of jurisdiction is grounded solely on their contention that the order appealed from is not a final, appealable order. The Brotherhood concedes that if the order is not a final one, it is not appealable 7

An order denying intervention of right is appealable. If the interest asserted by the applicant for intervention is such that he must be allowed to intervene in the suit as a matter of right, an order denying him intervention constitutes a final adjudication that no such interest has been asserted; it concludes the case as to him and is therefore appealable..... 7-8

The question of what interest a party must have to entitle him, as a matter of right, to intervene must therefore be considered..... 8

The Brotherhood, as an indispensable party, has an absolute right to intervene. Its interest is such as to bring it within the definition of indispensable party. The trainmen of the River Road, by virtue of their contract providing that they shall perform all yard work on that railroad, are indispensable parties to this suit, because by this suit the plaintiffs seek to adjudicate directly on the rights of the trainmen under their contract..... 9-11

Plaintiffs' argument that the employees of the River Road have no interest to protect in the litigation erroneously presupposes that the provision, enacted in 1940, of the Interstate Commerce Act (49 USCA Section 5 (2) (f)), guaranteeing to carriers and their employees that "hereafter" they shall have freedom to enter into contracts for the protection of employees, can have no application to this case, even though the River Road and its employees made such an agreement on January 23, 1946..... 11

Plaintiffs' argument that the employees' contract gives them no interest in this suit in view of the Commission's order relies on plaintiffs' unwarranted assumption that the contract is in fact violative of that order. The order contains questions of interpretation and construction as to which full argument should be heard to decide whether the order and the contract can or cannot be reconciled. To hold that since the plaintiffs say the contract is violative of the order, then those claiming under the contract may be enjoined from so doing but have no interest in and are not entitled to participate in the suit, lest they say something to the contrary, is plainly a preadjudication, *ex parte*, of the case on the merits 11-12

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Intervention of right is provided by Federal statutes. Rule 24 (a) (1) of the Rules of Civil Procedure for District Courts of the United States requires allowance of intervention as a matter of right when provided for unconditionally by Federal statute. The

Brotherhood relies on two such statutes: Section 17 (11) of the Interstate Commerce Act, Part I, (49 USCA Chap. 1, Sec. 17 (11)) and Judicial Code, Sections 212, 213 (28 USCA Sec. 45a).....15-18

The Brotherhood is entitled to intervention of right under Rule 24 (a) (2) of the Rules of Civil Procedure for District Courts granting to "anyone" the right to intervene "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." The only litigant in the case who might have defended the employees' employment contract is the River Road, the other party to that contract. The River Road has stated that it feels no duty whatever "to represent in this suit the interests of the Brotherhood", and its acts and failures to act bear that out.....18-20

II.

The motion to affirm for lack of substantial question should be denied. Plaintiffs, in the alternative, have moved to affirm the order denying the Brotherhood leave to intervene because the questions involved are said to be not substantial. Substantial questions involved in the appeal include not only whether employees of a carrier are, under the Rules of Civil Procedure, entitled to be heard in a suit intended to nullify the employment contract between the employees and the carrier but also the correct interpretation of a Federal statute believed to establish the validity of such a contract and of two Federal statutes believed to guarantee to employees the right to be heard.....20-21

ARGUMENT.

I.

The Motion to Dismiss for Lack of Jurisdiction Should Be Denied Because the Order Appealed From Is Final and Is Therefore Appealable to This Court Under the Applicable Statutes.

The jurisdictional statutes above cited provide that direct review by this court may be had of a final order entered in a suit brought to enforce an order of the Commission other than for the payment of money. The pertinent provisions were fully quoted in the Brotherhood's Jurisdictional Statement (Tr. 237-238). And there is no question that the order appealed from was entered in a suit brought, as the complaint states, under "the Interstate Commerce Act for enforcement of an order of the Interstate Commerce Commission" other than for the payment of money (Tr. 6).

Plaintiffs' motion to dismiss for lack of jurisdiction is grounded solely on their contention that the order appealed from is not a final, appealable order (Tr. 299-300). From this we believe it may be fairly assumed plaintiffs concede that if the order is a final one, then the appeal was properly taken under the Expediting Act, and this court has jurisdiction to consider it. Conversely, we concede that if the order is not a final one, it is not appealable.

(a) An Order Denying Intervention of Right Is Appealable.

The authorities are in general agreement that the finality, and thus the appealability, of an order denying intervention depends on the nature of the interest sought to be protected by intervention. The rule may be broadly stated

as follows: If the interest asserted by the applicant is such that he must be allowed to intervene in the suit as a matter of right, an order denying him intervention constitutes a final adjudication that no such interest has been asserted; it concludes the case as to him and is therefore appealable. The rule is concisely stated in *Alston Coal Co.* v. *Federal Power Commission*, 137 F. 2d 740, at 741:

> "It is a well settled principle of law that where intervention is a matter of right, an order denying the right to intervene is a final, appealable order."

The same rule is recognized by this court in *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502, 85 L. ed. 975, in which a former decree had expressly provided for intervention by the Panhandle Company. In reversing the district court order denying intervention to this company, the court said (at 508 of the U. S. report):

> "And since the protection afforded Panhandle by Section IV of the decree could only be secured by the remedy designed by Section V, to wit, active participation in the suit, the denial of that protection is a definitive adjudication, and so appealable."

It is therefore clear that if the intervention sought was as a matter of right, rather than a matter in the trial court's discretion, an order denying intervention is final and appealable.

And so we may now turn to the question of what interest in the litigation the party seeking intervention must have in order to entitle him, as a matter of right, to participate therein.

(b) The Brotherhood, as an Indispensable Party, Has an Absolute Right to Intervene.

Surely if the applicant can show that his interest is such as to make him an indispensable party, he has an absolute right to intervene. We submit that the trainmen of the River Road, by virtue of their contract providing that they shall perform all yard work on that railroad, are indispensable parties to this suit, because by this suit the plaintiffs seek to adjudicate directly on the rights of the trainmen under their contract. The fact that the performance or non-performance of that contract is the very essence of this litigation is shown not only by the Brotherhood's motion to intervene (Tr. 135-147), but by the issues as set forth in the complaint (par. 13, Tr. 10-11) and the answer of the River Road (3rd Defense, Tr. 127-130). To nullify the Brotherhood's contract and enjoin its performance is the obvious purpose of this suit, and would inevitably be a direct result of a decree in plaintiffs' favor. The long settled rule in this regard is plainly stated in *Mallow* v. *Hinde*, 12 Wheaton 194, 25 U. S. 116, at 119-120 of the U. S. report:

> "* * * no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court."

This rule was the basis for the often quoted definition of indispensable parties stated in *Shields* v. *Barrow*, 17 How. 130, 58 U. S. 409, 15 L. ed. 158, as follows at page 411 of the U. S. report:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

The test of indispensability as applied to a party who was not joined, but is seeking intervention, is treated in

International Brotherhood v. *Keystone Freight Lines*, 123 F. 2d 326. In that case a motor carrier sought a mandatory injunction to compel certain other motor carriers to resume handling of freight forwarded by the plaintiff to the defendants in accordance with alleged contractual relations existing between them. The labor union representing the employees of the defendant carriers sought leave to intervene on the ground that the employees had an employment contract with the defendants under which they were entitled to refuse to handle plaintiffs' freight, that they had so refused to handle it, and that the relief sought by plaintiffs would deprive them of their rights under that contract. Regarding the nature of the union's interest in the suit, the court said (at 329):

> "As has been pointed out, Plaintiff sought affirmative relief not only against the defendant companies but also against Intervenor and its members when it prayed for an injunction against defendants, their agents, servants and employees. If the allegations of Intervenor's pleading are taken as true, it is the real party in interest. In any event, under the issues as framed by the petition, it had a substantial interest in the controversy and was a necessary party thereto. Its right of intervention was not permissive, but absolute, under Rule 24(c), and it was error to deny its application for intervention."

The factual similarity of that case to this one is readily apparent. Yet in our case plaintiffs argue that because of the "antecedent" order of the Commission of 1922, the employment contract between the Brotherhood and their employer is unavailing to create an interest in the Brotherhood which entitles it to intervene in this suit (Tr. 289-290). The making of this argument should in itself dispel any doubt that the actual purpose of this suit is to nullify the Brotherhood's employment contract without opposition on the merits from the real party in interest. This is so be-

cause the record already made by the Brotherhood shows that the "antecedent" quality of the Commission's order is highly questionable, to say the least, inasmuch as the original contract in question is dated in 1919. This point may well become material in determining, at a trial on the merits, the exact nature of the "status quo" of operating relationships which plaintiffs say should be maintained, but it is obviously premature to resolve the question in advance, and thus to determine whether the Brotherhood has stated an interest in the suit which will sustain intervention.

But regardless of the respective dates of these documents or their relative efficacy, the plaintiffs' argument also presupposes that the provision enacted in 1940 of the Interstate Commerce Act (49 USCA Sec. 5 (2) (f)), guaranteeing to carriers and their employees, that "hereafter" they shall have freedom to enter into contracts for the protection of employees, can have no application to this case. Whether the Commission's order, interpreted in the light of this statutory provision, can be said to render null and void the original contract and the agreement of January 23, 1946 between the Brotherhood and the River Road is plainly a matter which should be heard on the merits, and not one which can be prejudged in the plaintiffs' favor at the outset so as to decide that the Brotherhood has no interest to be protected, and thus no right to intervene.

But the most serious fallacy of plaintiffs' argument that the employees' contract can reveal no right or interest in view of the Commission's order lies in their wholly preemptive assumption that the contract is in fact violative of the order.

As already pointed out in our statement of the case, the report of the Commission does not state whose employees handle foreign line traffic on the tracks of the River Road. Nor does the order of the Commission cover this item (Tr. 46). Even if it were granted that the order does require

the River Road to permit plaintiffs to use their own switch engines on River Road tracks, surely it does not necessarily follow that foreign crews are also included.

Again, the report of the Commission does not state that empty cars for loading livestock other than hogs and sheep are moved to points of loading by the foreign carriers and, on the contrary, the report implies that such movements are handled by employees of the River Road or its predecessor (Tr. 23).

These are matters of interpretation and construction on which all sides should be heard, and are only some of many points which must be considered, on their merits, in deciding whether the order and the contract can or cannot be reconciled. In no other way can it be fairly determined whether the order has been violated. To hold in advance that for the purpose of deciding who shall be parties, only the plaintiffs' side of these questions can be considered is manifest injustice. To hold that since the plaintiffs say the contract is violative of the order, then those claiming under the contract may be enjoined from so doing but are not entitled to participate in the suit, lest they say something to the contrary, is plainly a pre-adjudication, *ex parte*, of the case on the merits. It cannot be denied that the plaintiffs' chances for success in the case are greatly enhanced when their real adversaries are kept out of it, and such a procedure no doubt makes for a speedy determination of the controversy, but it can hardly be described as a judicial process. Yet the trial judge's remarks concerning the order and the contract clearly suggest such an approach. Pertinent excerpts follow:

Tr. 105:

> "The Court: Well, either you (the Brotherhood) are an indispensable party or you are not an indispensable party, one or the other; I don't know which it is. But it is one or the other. If you are an indispensable

party, acts that have been taken heretofore without your being joined would not be binding on you.

"Mr. Williamson: Yes.

"The Court: If you are not an indispensable party, then you haven't any business in here."

Tr. 108-109:

"The Court: Could that contract affect a previously existing order of the Interstate Commerce Commission?

"Mr. Williamson: Your Honor, this contract has been in effect for some time. There has been a controversy between the employees and the railroad for years, as to the effect—

"The Court: I am asking you about an order of the Interstate Commerce Commission. Could that contract affect that order?

"Mr. Williamson: I am not here to argue the merits, but I would say that contract—

"The Court: Then there is no use of having an Interstate Commerce Commission. You might as well turn this over to private bargaining."

Tr. 111-112:

"The Court: This Court intended to hold, right or wrong, that a unilateral agreement between a couple of parties cannot affect an order of the Interstate Commerce Commission. If that order is bad it must be attacked directly through the means provided by law, and not by a collateral agreement between two parties. That is my intention, to so hold, and that is what I held, so far as I know, unless there is something in the order which I overlooked.

"Your position, I take it, is that the Trainmen can make an agreement with one of the parties that will affect, offset an order of the Interstate Commerce Commission which has been in force for many years. I take it that is your position.

"Mr. Williamson: That is a question of the merits.

"The Court: I don't know why you can't submit it to this Court as a matter of law, and then if it goes

to the Circuit Court of Appeals or the United States Supreme Court, it can go on some kind of a simple record."

Tr. 203:

"The Court: I took the position and I intend to adhere to the position, that an order of the Commerce Commission cannot be avoided by private contracts between any individuals or groups of individuals or railroad companies, or anybody else. If there is relief wanted from such an order of the Commission it must be obtained in the statutory manner and through the regular channels. That is the holding I made and that I will keep on making.

"I do not know what you will file in the way of briefs, but you may as well know it now."

We believe it is evident from the above that the trial court has fallen into plaintiffs' error of assuming that a violation of the Commission order exists in this case even before the principal parties charged with such violation are in court. It is also apparent that the court below has adopted plaintiffs' notion that any defense urged against the violation as charged constitutes an attack on the order itself, and is therefore absolutely forbidden except in a suit brought by the offender before three judges under the Urgent Deficiencies Appropriation Act (28 U. S. C. A. Sec. 47).

With all respect due a Commission order, we submit that employees may look at it and may even suggest, without *lese majesty*, that the order might be so interpreted that their right to work may exist within the order.

(c) Intervention of Right Is Provided by Federal Statutes.

Rule 24 (a) (1) of the Rules of Civil Procedure for District Courts of the United States requires allowance of intervention as a matter of right when provided for unconditionally by Federal statute. The Brotherhood relies on two such statutes.

Section 17(11) of the Interstate Commerce Act, Part I, (49 U. S. C. A. Chapter 1, Sec. 17(11)), provides as follows:

> "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees."

The words "this chapter" (Chapter 1) as used above refers to the same chapter under which this suit was brought, as is shown by plaintiffs' complaint, par. 6 (Tr. 6). Under this provision the only inquiries which could properly be made in our case are whether the Brotherhood is the "duly designated" representative of River Road employees, and whether this proceeding affects such employees. If both facts exist, the right to intervention is established. Both are amply covered in the Brotherhood's motion to intervene, and are not disputed by plaintiffs.

The only argument advanced by plaintiffs against the conclusion that the above statutory provision requires the District Court to allow intervention by the Brotherhood in this case is their contention that the provision applies only to proceedings before the Commission, and not to court proceedings (Tr. 295). Such a construction of the statute would obviously require, at the outset, insertion of new words into the statute so that the above phrase "any proceeding arising under this chapter" would be changed to read "any proceeding before the Commission arising under this chapter." Plaintiffs apparently believe they can add

these words to the statute because the heading of that section contains the phrase "Commission Procedure" and that therefore the portion of the section in question refers only to proceedings before the Commission. If such were the intention of Congress, then the phrase in question would certainly not be "any proceeding arising under this *chapter*", but would read instead "any proceeding arising under this *section.*"

Plaintiffs do not even hint at any reason why Congress should have intended by this provision to grant railroad employees the right of intervention in Commission proceedings, and yet withhold such protection as to court proceedings. We have only plaintiffs' unsupported suggestion that a result so patently inconsistent and unjust as this is the true intent of the law, although that result necessarily involves the doing of violence to the clear meaning of the words used in the law and the insertion of words which are not there.

The second statutory provision relied on by the Brotherhood in seeking intervention of right is the Judicial Code, Sections 212, 213 (28 U. S. C. A. Sec. 45a), the pertinent portions of which are as follows:

> "associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof;"

The "aforesaid sections" referred to in this provision include section 44 of the same title, relating to suits to enforce a Commission order other than for the payment of money.

This provision is so obviously applicable to a case of this nature that plaintiffs have made no attempt to argue other-

wise. Their contention is that since the provision only requires that intervention be granted to those associations which are "interested" in the suit, and the statute itself does not define this term, it must mean the same degree of interest which is required for intervention generally (Tr. 296). In other words, if an association can show its right to intervene without this statutory provision, then plaintiffs are willing to concede that the statute does not bar it. That is merely a roundabout way of saying the statute means nothing.

We submit that a much more logical and not too liberal interpretation of this provision in the statute is that an association seeking intervention must be allowed to do so on the showing of some legal interest in the suit as distinguished from a mere casual or frivolous interest, but that the interest shown may be something less than that which would entitle the party to institute the suit, or which is generally required of intervenors. Cf. *Moffat Tunnel League* v. *U. S.*, 289 U. S. 113, 77 L. ed 1069.

We think neither the words nor the spirit of this statute would be strained if, for example, it were held that an association whose members have been thrown out of certain employment by the terms of an injunction issued in the suit it seeks to enter has by this fact alone shown a sufficient interest to satisfy the requirements of the statute allowing intervention.

The only case cited by plaintiffs on this point is *Boston Tow Boat Co.* v. *U. S.*, 321 U. S. 632, 88 L. ed. 975. In that case the intervenor was allowed to intervene in the suit in the District Court on a mere showing that its business was somewhat similar to that of the plaintiff in the case, and that it might be adversely affected by the precedent established if the decision went against the plaintiff, *i. e.*, if the plaintiff were held to be subject to the Interstate Commerce Act. From a decision on the merits against plaintiff, the

intervenor sought a separate appeal, and the sole question presented and decided was that the intervenor did not have the right to prosecute an independent appeal. On the subject of intervention, the court, speaking through Mr. Justice Black, said (p. 634 of U. S. report):

> "Whether Boston had sufficient interest to intervene as of right before the Commission and in the District Court we need not decide, the issue here being only whether Boston has such an 'independent right which is violated' by the decision against Cornell as will support an independent appeal."

The interest shown by the Brotherhood in its application for intervention is vastly greater than to avoid establishment of an unfavorable precedent. We think the above case, to the very limited extent pertinent to our case, favors allowance of intervention by the Brotherhood.

(d) The Brotherhood Is Entitled to Intervention of Right Under Rule 24 (a) (2) of the Rules of Civil Procedure.

This rule is as follows:

> "Rule 24. Intervention.
>
> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in any action * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action;"

The fact that representation of the employees' interest by existing parties "is or may be inadequate" is not open to serious question. The only litigant in the case who might have defended the employees' employment contract is the River Road, the other party to that contract. The River Road has shown it does not view the contract in nearly the same light as does the Brotherhood; it acknowledges adversity of interest thereunder, and feels no duty what-

ever "to represent in this suit the interests of the Brotherhood" (Tr. 187-190). The River Road by its answer pleads in effect an apology for the contract, and especially for its part in the making of it, explaining that the settlement interpretation of January 23, 1946 "was entered into by the River Road solely to prevent the said threatened strike" (Tr. 130). It is clear enough from this fact alone that the River Road, as obligor under a contract it frankly considers onerous, is in no position to champion the defense of a suit which may relieve it of its obligations thereunder. And considering the nature and extent, not to mention results, of the defense effort thus far made by the River Road, it is all too plain that to say this representation of the employees' interest "is or may be inadequate" is a gross understatement. We think it is unnecessary to review here all the inadequacies in the River Road's defense which were specified in the Brotherhood's motion to intervene (Tr. 141-145). One example we consider typical is the failure of the River Road to invite the court's attention, in view of the labor dispute between it and the Brotherhood, to the applicability of the Norris-LaGuardia Act (29 U. S. C. A. Sections 101-115). A case which squarely holds that the Act is applicable is *Lee Way Motor Freight* v. *Keystone Freight Lines*, 126 F. 2d 931, certiorari denied in 317 U. S. 645, 87 L. ed. 519. It holds, in a factual situation strikingly similar to this one, that the suit for injunction must be dismissed. No mention of the Act or of this case was made by the River Road in opposition to the injunction sought and issued here, although its counsel later acknowledged that they had considered both the Act and the case, "but were not persuaded that they were applicable or decisive" in this suit (Tr. 189).

The only remaining requirement of Rule 24 (a) (2) is that the applicant for intervention of right "is or may be bound by a judgment in the action." The employees are

already under a temporary injunction issued in this action commanding them to let others do work allotted to them under their employment contract, work they were doing when the suit was started, and lost under the express terms of the temporary injunction herein entered. The ultimate purpose of this suit is to make that injunction permanent. We submit that it would be laboring the obvious to argue further that the Brotherhood members "are or may be bound" by a judgment in this case within the meaning of Rule 24 (a) (2). Plaintiffs' protestations (Tr. 295) that such loss of work would be only "the incidental effect of the judgment" and that these employees might still recover damages against the River Road for breach of contract cannot alter the fact that these employees are specifically designated by plaintiffs as persons to be bound by the harshest of all injunctive remedies.

II.

The Motion to Affirm for Lack of Substantial Question Should Be Denied.

Plaintiffs in the alternative have moved to affirm the order denying the Brotherhood leave to intervene, because if the record shows that this court has jurisdiction, yet the questions involved "are so insubstantial as not to need further argument" (Tr. 300). However, plaintiffs direct no portion of their statement specifically to this point.

Substantial questions involved in this appeal are set forth in the Brotherhood's Jurisdictional Statement (Tr. 240-242). They include not only whether employees of a carrier are under Rules of Civil Procedure for District Courts entitled to be heard in a suit intended to nullify the employment contract between the employees and the carrier, but also the correct interpretation of a Federal statute

believed to establish the validity of such a contract (49 U. S. C. A. Sec. 5 (2) (f)) and of two Federal statutes believed to guarantee to employees the right to be heard (49 U. S. C. A. Sec. 17 (11) and 28 U. S. C. A. Sec. 45a).

Conclusion.

The Brotherhood urges that the plaintiffs' motion to dismiss the Brotherhood's appeal from the order denying leave to intervene or to affirm the order denying leave to intervene, should be denied.

Respectfully submitted,

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